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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

LEILA JEANNE HILL et al.,
Petitioners,
vs.
THE STATE OF COLORADO,
ROY ROMER, GOVERNOR et al.,
Respondents.

On Petition for Writ of Certiorari to
the Court of Appeals of the State of Colorado

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Was the Colorado Court of Appeals correct in holding that Colo. Rev. Stat. § 18-9-122(3) (1995 Cum. Supp.), which regulates the manner of expressive activities within 100 feet of the entrance of health care facilities, is constitutional as a reasonable time, place or manner regulation of speech?

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STATUTORY PROVISION

The version of § 18-9-122 reprinted in the petition for writ of certiorari contained a typographical error and was incomplete. In full, Colo. Rev. Stat. § 18-9-122 (1995 Cum. Supp.) provides:

> **18-9-122. Preventing passage to and from a health care facility - engaging in prohibited activities near facility.** (1) The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or

counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern. The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person's entry to or exit from a health care facility.

(2) A person commits a class 3 misdemeanor if such person knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility.

(3) No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

(4) For the purposes of this section, "health care facility" means any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state.

(5) Nothing in this section shall be construed to prohibit a statutory or home rule city or county or city and county from adopting a law for the control of access to health care facilities that is no less restrictive than the provisions of this section.

(6) In addition to, and not in lieu of, the penalties set forth in this section, a person who violates the provisions of this section shall be subject to civil liability, as provided in section 13-21-106.7, C.R.S.

STATEMENT OF THE CASE

The Colorado General Assembly enacted Colo. Rev. Stat. § 18-9-122 (1995 Cum. Supp.), to protect access to health care, public safety, and privacy, following a history of demonstrations that blocked or impeded access to health care facilities through direct physical blockades, grabbing and shoving patients seeking access, and other intimidating and threatening activities such as surrounding cars and people at close quarters, thrusting posters and leaflets against windows and into faces. R.S.[1] 146-56, 176-78, 181-83, 188-89, 233-38, 241-43. The General Assembly relied in part on experience under very similar city ordinances, passed in Denver in 1990 and in Boulder in 1986, which had

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[1] The Record in this case was in 3 volumes all entitled "Volume I," due to the district court's inadvertent omission and later transmission of some designated documents. This brief will refer to the volume transmitted to the Colorado Court of Appeals on August 5, 1994 as "R. ___;" and to the volume transmitted on October 26, 1994 as "R.S. ___."

successfully operated to protect health care access without interfering with expressive activities. R.S. 144, 155-56, 188-89, 199, 231.

The statute prohibits both physically obstructing access and, in § 18-9-122(3), interfering with access through intimidating "forced proximity"[2] -- forcing leaflets, signs or speech on unwilling listeners at extremely close quarters. The General Assembly acted not out of hostility towards any particular viewpoint, but out of concern about the harmful effects of the aggressive and intimidating physical tactics of some demonstrators. R.S. 189-92, 196-97, 217-18, 222, 230-33, 238-240. The record in this case shows that the "forced proximity" targeted by the statute causes anxiety and fear for personal safety, triggering physiological responses that can increase the risks of medical procedures for patients seeking health care. R. 263-65; R.S. 4, 7-9, 26-30, 36-38, 40-42, 44, 240. The record further shows that a close, unconsented approach by a stranger in public is interpreted as a threat and raises the fear of physical contact. R. 262.

Petitioners several times misstate the operation of the challenged provision, § 18-9-122(3) (hereinafter "the statute"). *See* Pet. at i, 5, 9, 11, 18, 27-28. It does not ban expressive activity within eight feet of any other person, as Petitioners assert. Pet. at i. Rather, within 100 feet of the entrance to a health care facility, it prohibits only: (1) "knowingly approaching" another person more closely than eight feet; (2) without the consent of that other person; (3) for the purpose of oral protest, counseling or education, leafletting, or displaying a sign **to that other person**.

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[2] *See* Note, *Too Close for Comfort: Protesting Outside Medical Facilities*, 101 *Harv. L. Rev.* 1856 (1988). R.S. 301-10.

Petitioners have also given an incomplete report of their experiences with the statute. Petitioners Hill, Himmelmann, and Simpson have all demonstrated outside health care facilities for a number of years. R. 112-13, 148-49, 151-52. Petitioner Hill admitted that since passage of the statute, she has continued sidewalk counseling, leafletting, picketing, and oral protest, education and counseling within 100 feet of health care facilities, albeit "with great caution and circumspection." R.S. 48, 54-55. Petitioner Himmelmann as well admitted that she has continued picketing and oral protest, education and counseling within 100 feet of health care facilities since passage of the statute. R.S. 57, 63-64. In spite of their continuing activities, none of the Petitioners have ever been cited, detained, arrested or referred for prosecution under the Denver or Boulder ordinances or the statute. R.S. 47, 56, 65. Petitioners' only contact with any law enforcement was a letter Petitioner Simpson **requested** from the Lakewood City Attorney's Office, which stated generally that Lakewood police were informed of and prepared to enforce the statute. R.S. 55, 63, 72. Both the trial court and the Colorado Court of Appeals recognized that Petitioners had brought only a facial challenge against the statute. Pet. App. at 4a, 11a.

Petitioners brought this challenge to the statute in Jefferson County District Court, which upheld the statute. Although Petitioners cite extensively to the trial court's opinion, they have omitted the most essential finding, that the statute "protects the persons using a health care facility to do so [sic] **without being threatened, harassed or assaulted by forced confrontations with demonstrators.**" Pet. App. at 14a (emphasis added).

Petitioners have also omitted the key ruling of the Colorado Court of Appeals that:

> [T]he statute does not burden speech more than is reasonably necessary because plaintiffs may continue to communicate with the patients and staff at a distance of eight feet or more. Indeed, the restriction merely is directed at depriving protesters of **the opportunity to intimidate or make other physical contact** with the patients or staff.

Pet. App. at 7a (emphasis added).

Finally, Petitioners incorrectly state that the Colorado Court of Appeals failed to consider two of their arguments. First, they assert that the court did not rule on their argument that the statute was impermissibly viewpoint-based. Pet. at 14. However, the Court of Appeals found that "the specific viewpoint of any person who protests at a health care facility is not relevant to a determination whether a violation of the statute has occurred." Pet. App. at 6a. *See also* Pet. App. at 8a (defining "protest" to include all viewpoints).

Second, Petitioners assert that their overbreadth argument was not addressed. Pet. at 14. In fact, the Court of Appeals addressed this argument. The court explained that the statute

> must be "narrowly tailored," that is, the restrictions must limit free speech only to the extent reasonably necessary to serve a significant governmental interest. Otherwise, the statute is deemed "overbroad." . . .
>
> We hold that § 18-9-122(3) meets the enumerated constitutional requirements.

Pet. App. at 6a-7a. Thus the court determined that the statute was narrowly tailored, and not "overbroad" in the sense that Petitioners use that term. *See* Pet. at 19.

REASONS FOR DENYING THE WRIT

The decision of the Colorado Court of Appeals carefully applied well-established principles of First Amendment law from previous decisions of this Court. The Colorado Supreme Court determined that the decision did not require review. Pet. App. at 19a. The decision below is not in conflict with the decision of any other lower court. Review by this Court is therefore not warranted.

I. THE DECISION BELOW APPLIED THE WELL-SETTLED TEST FOR STATUTES IMPOSING REASONABLE TIME, PLACE OR MANNER REGULATIONS.

Petitioners describe this petition as "afford[ing] this Court the opportunity to dispose of *legislative* schemes" which improperly restrict speech in public forums, and suggest that it parallels issues presented in *Pro-Choice Network of Western New York v. Schenck*, 67 F.3d 377 (2d. Cir. 1995) (en banc), *cert. granted sub nom. Schenck v. Pro-Choice Network of Western New York*, 116 S.Ct. 1260 (1996). Pet. at 16. Unlike this case, *Schenck* involves the proper scope of an injunction, an area of law which this Court is still clarifying. *See Madsen v. Women's Health Center, Inc.*, 114 S.Ct. 2516 (1994).

The test for a **statute** which regulates speech, however, has long been settled, and requires no further review by this Court:

> Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, and manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

Clark v. Community for Creative Nonviolence, 468 U.S. 288, 293 (1984). *See also Madsen*, 114 S. Ct. at 2524; *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *United States v. Grace*, 461 U.S. 171, 177 (1983); *Frisby v. Schultz*, 487 U.S. 474, 481 (1988); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The Colorado Court of Appeals applied this test, finding that the statute was content-neutral, narrowly tailored to serve a significant government interest, and left ample alternative channels of communication. Thus, the court concluded that the statute was constitutional. Pet. App. at 6a-7a. There is nothing in the lower court's application of this test requiring review.

Petitioners attempt to portray this case as much more significant than it is. Their petition presents no new legal arguments or theory to this Court. Rather, it merely disputes how the Colorado Court of Appeals applied properly stated rules of law clearly derived from this Court's precedents.

Petitioners argue that the Colorado Court of Appeals applied the wrong standard and that the statute is content-based. Pet. at 19-21. This argument, however, is unsupported by the record, and does not merit this Court's attention.

The applicable standard for determining content neutrality is well-established:

> The principle inquiry in determining content neutrality. . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech.

Ward, 491 U.S. at 791 (citations and quotation marks omitted); *see also Madsen*, 114 S.Ct. at 2523. The statute here meets that test. Like the injunction in *Madsen*, it is directed at harmful **conduct** by demonstrators, regardless of their viewpoint. *Id.* at 2523-24. It is not the content of "passing a leaflet or handbill," "displaying a sign," or "engaging in oral protest, education, or counseling" but the threatening and intimidating close **approach** while engaging in these expressive activities which is targeted.

Petitioners apparently do not dispute that the leafletting and sign provisions are content-neutral, but assert that the statute's reference to "oral protest, education, or

counseling" is improperly content-based. Pet. at 20. This argument is inconsistent with the cases cited by Petitioners, which discuss either viewpoint or subject matter discrimination.

As authoritatively construed by the Colorado Court of Appeals, the statute applies to all viewpoints. Pet. App. at 6a, 8a. Contrast this with *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992), striking down a "bias-motivated crime" ordinance that expressly applied to only one side of a debate.

"Protest, education, or counseling" also encompass all topics, as construed by the Colorado Court of Appeals. Pet. App. at 8a.[3] The statute does not apply to only speech on a particular topic, such as labor, *see Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Carey v. Brown*, 447 U.S. 455, 461 (1980), or politics, *see Boos v. Barry*, 485 U.S. 312, 318-19 (1988); *Burson v. Freeman*, 504 U.S. 191, 197 (1992).

The record clearly demonstrates the statute's content-neutrality. As the bill's sponsor expressly stated: "We're not telling people what they can say. They can say anything that, that they want." R.S. 221. During the floor debate another representative explained the statute: "I don't care

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[3] "Counseling and education" referred to "**efforts to present information or guidance** to persons entering or leaving a health care facility;" "protest" referred to "**written or oral communication advocating a viewpoint** on medical treatment or procedures." Pet. App. at 8a (emphases added). The plain language of the statute is not limited to speech on medical treatment, and the part of the Court of Appeals' decision which refers to medical treatment merely provides an example but does not limit the application of the statute to speech on medical topics.

what side you're on. If you're pro or con, stay back eight feet." R.S. 222. The court below followed this Court's precedents in determining that the statute is content-neutral.

Further, the Colorado Court of Appeals found that the statute served the significant government interest of "ensur[ing] the safety and unobstructed access for patients and staff entering and departing from health care facilities" while "not burden[ing] speech more than is reasonably necessary." Pet. App. at 7a. Petitioners apparently dispute this, arguing that the statute is "overbroad" under the *Madsen* decision, and not a "close fit." Pet. at 17-19, 28. Of course, as discussed below, *Madsen* applied the stringent test for injunctions, so that a finding of overbreadth under that test does not translate to overbreadth in a statute.

This Court has long held that a statute is narrowly tailored so long as it promotes a substantial government interest that would be achieved less effectively in its absence. *Ward*, 491 U.S. at 799. The decision below is a straightforward application of this principle.

The statute prohibits only the intrusive format of "forced proximity." It does not ban or suppress leafletting, picketing or speech; it merely draws a narrow eight-foot zone around medical patients and staff where such activities may not be forced upon them. It is hard to imagine what lesser distance would suffice to protect patients from intrusive and inescapable approaches. Thus the statute eliminates the exact source of the evil it was intended to remedy -- focused, forced confrontations, like the focused residential picketing completely banned under *Frisby*, 487 U.S. at 485-87. This is the epitome of narrow tailoring.

II. THE DECISION BELOW IS CONSISTENT WITH *MADSEN*.

The Colorado Court of Appeals was specifically aware of and based its decision upon relevant holdings in *Madsen v. Women's Health Center, Inc.*, 114 S.Ct. 2516 (1994). Pet. App. at 6a. Unlike the injunction reviewed in *Madsen* or the injunction now before the Court in *Schenck*, this case concerns a statute of general applicability, which "represent[s] a legislative choice regarding the promotion of particular societal interests," and carries a lesser risk of censorship than an injunction. *Madsen*, 114 S.Ct. at 2524.

Accordingly, *Madsen* articulated a more rigorous test for injunctions: they must "burden no more speech than necessary to serve a significant government interest." *Id.* at 2525. *Madsen* also makes it clear, however, that the test is simply not applicable to the statute at issue here. *Id.* at 2524.

Petitioners argue that *Madsen* struck down an injunctive provision "functionally similar" to the statute at issue here. Pet. at 19. In reality, the injunctive provision struck down was far broader than Colorado's statute and was analyzed under a stricter test. Further, *Madsen* upheld a method of preserving access to health care more restrictive than the statute here, imposing a 36-foot "speech-free buffer zone" around a medical clinic. 114 S. Ct. at 2526-28. Therefore, under *Madsen* an eight-foot "speech-free buffer zone" around patients as they drew near to health care facilities would be justified. The decision below approves an even less restrictive alternative that allows speech within the buffer zone. This is clearly consistent with *Madsen*.

Petitioners focus on a different provision of the injunction in *Madsen*, which prohibited:

> At all times on all days, in an area within [300] feet of the Clinic, . . . physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the [petitioners].

Id. at 2522. This provision included no proximity requirement for the prohibited "approach" with the 300-foot zone, so that a demonstrator who took one step towards a patient located across the street from him would be in violation. Further, access to the clinic was already protected by other provisions of the injunction, including the 36-foot speech free buffer zone. Thus, under the more stringent standard imposed on an injunction, this Court found: "The 'consent' requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic." *Id.* at 2529. The provision improperly prevented all approaches "regardless of how peaceful the contact may be." *Id.*

Colorado's statute, however, applies only within eight feet -- the last two or three steps before physical contact occurs. A focused, targeted approach by a stranger shouting slogans at a distance closer than eight feet is experienced by most people as a threat. R. 262. Because such a close approach is "so infused with violence as to be indistinguishable from a threat of physical harm," *see Madsen*, 114 S.Ct. at 2529, it is properly subject to regulation. Thus, because the facts and the legal standard concerning the *Madsen* "no-approach" provision were different, the decision below does not conflict with *Madsen*.

For the same reasons, resolution of the issues currently before the Court in *Schenck* will be of limited application here. That case also involves an injunction, which imposed a broader 15-foot mobile buffer zone around clinic property, people, and cars, not limited to a 100-foot or even 300-foot zone surrounding the clinic. Thus the facts and the legal standard are again different.

Petitioners also argue that the statute is overbroad under *Madsen* because it regulates all approaches rather than only approaches of patients and staff of medical facilities. Pet. at 18. Neither *Madsen* nor any other decision of this Court turn on such a distinction. The Colorado General Assembly made the legislative choice that it would not require patients and staff to identify themselves in order to benefit from the protection of the statute. Further, families and friends of patients also merit protection. *See Madsen*, 114 S. Ct. at 2528 ("patients and relatives alike often are under emotional strain and worry") (quotation marks and citations omitted).

III. THE DECISION BELOW MERELY APPLIES A LONG-SETTLED DEFINITION OF PRIOR RESTRAINT.

Petitioners argue that "[t]he decisions below exalted form over substance," Pet. at 24, because they found that the prior restraint doctrine applies only to the actions of government officials. Pet. App. at 9a, 17a. Petitioners attack the statute because "nothing in [it] compels the public to grant consent" to approach their persons. Pet. at 22. The decision below, however, is correctly based on the "fundamental tenet of our Constitution. . . that the government is subject to constraints which private persons

are not," *ISKCON v. Lee*, 112 S.Ct. 2711, 2717 (1992) (Kennedy, J. concurring).

This Court need not even reach that issue, however, because the statute does not prevent expression of a message, the basic test for a prior restraint. *See Madsen*, 114 S. Ct. at 2524 n.2 (injunction was not a prior restraint: "[Demonstrators] are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the 36-foot buffer zone."). Here demonstrators may express their messages in any one of a number of ways; they are simply prohibited from expressing them within the eight-foot bubble for unconsenting targets.

The Court of Appeals was "not aware of any authority that would extend this doctrine" to a private citizen, Pet. App. at 9a, because this Court has consistently found that prior restraints give "**public officials** the power to deny use of a forum in advance of actual expression." *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) (emphasis added).[4] Petitioners have not cited a

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[4] *See also Riley v. National Federation of the Blind*, 487 U.S. 781, 802 n.14 (1988) ("**Secretary of State** has unbridled discretion"); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763 (1988) ("unbridled discretion of a **government official**"); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990) (same); *Secretary of State v. J.H. Munson Co.*, 467 U.S. 947, 964 n. 12 (1984) ("unguided discretion of the **Secretary of State**"); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969) ("**licensing officials**" had unbridled discretion); *Freedman v. Maryland*, 380 U.S. 51, 56 (1965) ("overly broad licensing discretion to an **administrative office**"); *Cox v. Louisiana*, 379 U.S. 536, 557 (1965) ("such broad discretion in a **public official**"); *Kunz v. New York*, 340 U.S. 290, 293 (1951) (discretionary power in "**administrative official**"); *Saia v. New*

single authority applying the prior restraint doctrine to the decisions of private individuals; their argument does not merit review by this Court.

IV. THE DECISION BELOW IS CONSISTENT WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT AND FEDERAL CIRCUIT COURTS.

Petitioners assert that the decision below conflicts with *United Food and Commercial Workers International Union v. IBP, Inc.*, 857 F.2d 422 (8th Cir. 1988), and *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 488 N.W.2d 401 (N.D. 1992). Pet. at 25-27. Those decisions, however, invalidated far broader restrictions on speech under more stringent standards and thus their holdings are inapplicable to the decision below.

In *IBP*, the Eighth Circuit addressed the constitutionality of a Nebraska labor picketing statute, which prohibited, among other activities:

> Using threatening language toward [another] person or any member of his or her immediate family, or in his, her or their presence or hearing, for the purpose of inducing or influencing, or attempting to induce or influence, such person to quit his or her employment, or to refrain from seeking or freely entering into employment, or by

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York, 334 U.S. 558, 560-61 (1948) ("uncontrolled discretion of the **Chief of Police**"); *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940) ("determination by **state authority**") (all emphases added).

> persisting in talking to or communicating in any manner with such person or members of his or her immediate family against his, her or their will, for such purpose.

857 F.2d at 425 n.4. Thus the statute imposed an unlimited ban on speech, with no place restrictions, and was expressly content-discriminatory. *See Boos v. Barry*, 485 U.S. 312, 321 (such regulations subject to exacting scrutiny). Contrary to Petitioners' assertions, the statute was not defended on the grounds that "unwelcome words are unprotected words." Pet. at 25. Rather, the state argued that the statute should be construed to apply only to "fighting words." *Id.* at 433. The Eighth Circuit declined to so drastically rewrite the statute, and so agreed with the district court that the provision was improperly content-based. *Id.* at 424, 435. Nothing in the circuit court's analysis in *IBP* is concerned with the constitutionality of a narrow place restriction like that in the statute here.

In *Fargo Women's Health*, the North Dakota Supreme Court considered the constitutionality of an injunction restricting protests outside an abortion clinic. The court upheld most of the injunction, but struck down a provision which prohibited "speaking to staff and patients of [the clinic] who indicate that they do not wish to be spoken to." 488 N.W.2d at 407 n.1. The court's entire analysis was contained in one sentence: "However, 'speaking' to staff and patients cannot be constitutionally enjoined." *Id.* at 411. The injunction also prohibited:

> distributing leaflets or brochures to any person who has indicated orally or by gesture that such person does not wish to receive such literature.

Id. at 407 n.1. Again, the court struck this down with a one-sentence analysis: "Obviously, distributing literature is protected communicative activity and a complete ban violates the First Amendment." *Id.* at 411.

The injunctive provisions stricken in *Fargo Women's Health* contained no place limitations whatsoever, unlike the statute here. Further, in the same decision the North Dakota Supreme Court upheld a prohibition against "harassing" or "intimidating" patients and staff. *Id.* at 410-11. Following a remand for more factual findings, it also upheld a provision of the injunction which excluded all but two peaceful picketers from a "protected zone" extending **100 feet from the clinic property line.** *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 502 N.W.2d 536 (N.D. 1993). Thus, the decisions of the North Dakota Supreme Court are consistent with the narrow eight foot restriction upheld below.

The decision below is in fact consistent with many other decisions of the courts of appeals and state courts of last resort, upholding various buffer zones as necessary to protect access to clinics and to protect patients from undue stress. *See, e.g., Sabelko v. City of Phoenix*, 68 F.3d 1169 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3625 (U.S., March 4, 1996) (No. 95-1415) (upholding ordinance with eight-foot bubble); *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 898 P.2d 402 (Cal. 1995), *petition for cert. filed*, 64 U.S.L.W. 3287 (U.S. Oct. 10, 1995) (No. 95-576) (upholding injunction which placed demonstrators more than 60 feet from clinic sidewalk, across a busy four-lane street); *Horizon Health Center v. Felicissimo*, 659 A.2d 1387 (N.J.Super. Ct. App. Div. 1995), *certification denied*, 667 A.2d 191 (N.J. 1995) (modifying injunction to allow "quiet sidewalk counselling" by no more than four individuals "who must stop counselling when a targeted individual indicates a

desire to be left alone"); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988) (upholding 25 foot "free zone"); *Hirsh v. City of Atlanta*, 401 S.E.2d 530 (Ga.), *cert. denied*, 501 U.S. 1221 and 502 U.S. 818 (1991) (upholding injunction imposing five-foot bubble within 50 feet of clinic property), *Bering v. SHARE*, 721 P.2d 918 (Wash. 1986), *cert. dismissed*, 479 U.S. 1050 (1987) (upholding injunction which placed demonstrators around the corner from clinic entrance). There is no conflict between the decision below and decisions of other courts which would necessitate review by this Court.

V. THE DECISION BELOW PRESENTS NO NEW OR IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW.

Petitioners argue that this case presents important principles of constitutional law needing resolution by this Court. Pet. at 27. In reality, Petitioners seek review of a statute and a decision which simply applied previous precedents of this Court.

Petitioners attack the statute because it does not protect access by prohibiting obstructions, trespass, assaults or threats. Pet. at 28. As discussed above, the statute specifically targets obstructive and threatening conduct entwined with speech. Although Petitioners might write a different statute, their disagreement with the reasonable means chosen by the Colorado General Assembly is not sufficient reason for this Court's review. *See Ward*, 491 U.S. at 800. As noted, buffer zones previously approved by this Court are a more restrictive means of preserving access to health care. There is no need to review Colorado's

decision to employ an even narrower restriction, which prohibits unconsented approaches that are tantamount to threats, while preserving the ability to "reach the minds of willing listeners." *See Kovacs v. Cooper*, 336 U.S. 77, 87 (1949).

Petitioners attack the statute for incorporating what they call an "audience veto" principle, and cite cases striking down "heckler's vetoes." Pet. at 28. This merely reflects a misunderstanding of the heckler's veto doctrine. The statute was carefully written to avoid a heckler's veto and allow the decision on approach to be made by each individual only for that individual. It regulates only displaying a sign or passing a leaflet **to** or counseling **with** another person without **that person's** consent. This is not the same as the classic "heckler's veto": allowing a hostile mob to force an unpopular speaker off the streets. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992).

This Court has long recognized the need to balance privacy and expressive activity, even on the public streets. "A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations." *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). Demonstrators may not "insist upon a constitutional right to form a cordon across the street and allow no pedestrian to pass who did not accept a tendered leaflet." *Schneider v. New Jersey*, 308 U.S. 147, 160 (1939). There is "a substantial and justifiable" state interest in regulating speech "directed primarily at those who are presumptively unwilling to receive it." *Frisby v. Schultz*, 487 U.S. 474, 488 (1988).

The use of a consent requirement to balance competing rights is in accord with this Court's decisions.

Rowan v. U.S. Post Office, 397 U.S. 728 (1970), upheld a statute which allowed an individual to invoke the power of the Post Office to prohibit delivery of mail which the individual found offensive, noting that leaving the decision to the individual avoided "constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a government official." 397 U.S. at 737. *See also Breard v. City of Alexandria*, 341 U.S. 622 (1951) (restriction on unwanted commercial solicitation upheld).

Consistent with this Court's pronouncements, the decision below recognizes that those outside health care facilities must still "tolerate insulting, and even outrageous, speech," *see Madsen*, 114 S. Ct. at 2529, but from eight feet away, decreasing the threat without cutting off communication. Petitioners' arguments against the statute implicitly rely on the completely unsupported principle that citizens who wish to avoid being pursued, surrounded, and threatened by demonstrators must never venture onto the public streets, even to seek needed medical services. This is not and has never been the law of this Court:

> For the right to communicate is not limitless. Even peaceful picketing may be prohibited when it interferes with the operation of vital governmental facilities. . . . Moreover, we have often declared that "[a] state or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech *irrespective of content*." In sum, "no mandate in our Constitution leaves States and governmental units powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the

> tranquility of spots selected by the people either for homes. . . or for public and other buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools, and hospitals."

Carey v. Brown, 447 U.S. 455, 470-71 (1980) (citations omitted).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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